ENFORCEABILITY OF CERTAIN COMMERCIAL CONTRACT CLAUSES IN TERMS OF MALTESE LAW AND A CONSIDERATION OF PUBLIC POLICY

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ABSTRACT[768]

The Maltese position regarding commercial clauses is rather ambiguous due to lack of both local legislation and jurisprudence. In today's global economy, with individual shifting from one employment to another at a rate which has never been seen before, when a contract of employment is entered into, there are certain clauses which are increasingly included. This article deals with a couple of such clauses, that is, non-compete clauses, non-solicitation clauses and severability clauses. The aim of these clauses is to create an ambit of fair competition between the contracting parties by striking a balance between the legitimate interests of both. This approach is key in preserving and strengthening trade in general. Despite the vagueness of the Maltese legal order on the topic, latent trends in the Maltese Courts' reasoning when dealing with commercial matters, seem to indicate that our justice system does appreciate the significance of the above-mentioned clauses which is crucial in today's everincreasing competitive industries. However, it is important to outline that, in principle, for contractual provisions to be enforceable, these should be reasonable in nature and do not breach public policy. Under Maltese law, public policy is still a rather abstract concept, a matter which is dealt with in this article, in an attempt to provide a non-exhaustive collection of principles which appear to constitute public policy according to the Maltese courts.

KEYWORDS: COMMERCIAL CLAUSES – NON-COMPETE – NON-SOLICITATION – SEVERABILITY – PUBLIC POLICY

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Non-compete clauses

1. Introduction

In today's world, with the emergence of the global economy and the advancements in technology, when a contract of employment is terminated, there are factors to be considered. When it comes to protecting confidential information, it is not only the technological aspect that needs to be considered, but there are the employees, who with the ever-increasing developments in technology, can pose a serious threat to an ex-employer.[769]

Therefore, employers are increasingly making use of restrictive covenants in their employment contracts with their employees, in order to safeguard their interests. Restraint of trade clauses are an,

> attempt to prevent the worker from disclosing the secrets which he would have undoubtedly got to know about through his employment, especially if he would have been employed in a position of trust as well as to possibly prevent that that same worker would provide competition to his ex-employer when he leaves work. These clauses incorporated within a contract attempt to protect an employer from 'poaching'. They attempt to restrict the activities which an employee may carry out after the said employee would have terminated his employment for whatever reason.[770]

One prominent clause is the non-compete clause. Although an employee post-termination of employment is restricted from exposing trade secrets gained

[769] Ann Bevitt and Daniel P. Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (*Mondaq*, 2008) <http://www.mondaq.com/unitedstates/x/58880/Human+Resources/Employment+And+Privacy+Issues+In+NonCompetition+Agreements> accessed 23 October 2016.

[770] Dr Joseph Bonello, 'Clauses in restraint of trade' (Department of Industrial and Employment Relations Issue 1, 2006) <https://dier.gov.mt/en/About-DIER/Publications-and-Archives/Newsletter/Documents/IReview_Issue1.pdf> accessed 23 October 2016.

during employment, employers do not only rely on such obligation not to divulge information.[771]

As Michael Whincup holds, non-compete clauses are used in order to prevent employees 'using (confidential) knowledge to the detriment of their employers either in subsequent business on their own account or in someone else's employment'.[772] This way there is the protection of the business investment along with the restriction of competition.[773] The employer is protected in that the trade secrets are safeguarded for a duration of time, and when the ex-employee is permitted to compete in the market, the value of those secrets is reduced, in that, more often than not the trade secrets would have a lesser value because of technological advancements that would have occurred in the field since the employee would have terminated his employment with the former employer. [774] When it comes to restrictive covenants, the situation in jurisdictions around the world differs significantly from one to another. Considering the subject from a global perspective, the position ranges from restrictive covenants being completely unlawful in particular systems, while completely legal in others. However, in certain instances, there is some overlap as is the position in Europe, with certain requirements and criteria being common to diverse jurisdictions.[775] For instance, compensation is a *sine qua non* requirement in certain jurisdictions such as Spain, France, Italy and Belgium, in order to have a valid non-compete agreement. [776]

The common stance in Europe is that restrictions are to be reasonable, without exceeding what is necessary in order to protect an employer's interests. Therefore, employers should pay more attention to factors like the duration and the scope of the restraints. The European Union is currently undergoing the legislative process of drafting a European Union Directive for trade secret protection, in order to have a level-playing field of protection.[777]

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771 Ralph Agius Fernandez, 'The Truth behind Trade Secrets' (Doctor of Laws thesis, University of Laws 2012) 57.

772 Michael Whincup, *Modern Employment Law* (6th edn, Heinemann Professional Publishing 1988) 71.

773 Ralph Agius Fernandez, 'The Truth behind Trade Secrets' (Doctor of Laws thesis, University of Laws 2012) 58.

774 ibid.

775 Seyfarth Shaw, 'Webinar recap! International trade secret and non-compete law update' (*LEXOLOGY*, 2015) <http://www.lexology.com/library/detail.aspx?g=aafaf547-f85f-4b2a-b715-a88d266590ed> accessed 23 October 2016.

776 Ralph Agius Fernandez, 'The Truth behind Trade Secrets' (Doctor of Laws thesis, University of Laws 2012) 58.

777 Seyfarth Shaw, 'Webinar recap! International trade secret and non-compete law update' (*LEXOLOGY*, 2015) <http://www.lexology.com/library/detail.aspx?g=aafaf547-f85f-4b2a-b715-a88d266590ed> accessed 23 October 2016.

2. Comparative analysis of non-compete clauses

If one analyses the approaches adopted in the United States and in the European Union, one immediately realises that there are considerable variations, not only between the European Union and the United States, but also between the different Member States themselves.[778]

2.1 *The United States*

In order to give an overview of the position in the United States, one may analyse the position in Delaware, because the majority of the other states take the same stance. Non-compete agreements are considered to be restrictions on trade but courts will

> generally enforce them if they are part of valid agreements supported by consideration, are reasonable in time and scope, and serve to protect the employer's legitimate economic interests, which generally include the employer's confidential information and goodwill developed through customer relationships.[779]

Delaware Courts have adopted the 'reasonable alteration' approach, whereby if a non-compete agreement goes beyond what is proportional in the circumstances, the Court will enforce it only to the extent that is proportional.[780]

California, as well as a number of other states, adopts a more restrictive approach which is based on the principle that 'every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.'[781] This approach gives greater importance to the interests of the employee rather than to the interests of the employer.[782]

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778 Ann Bevitt and Daniel P. Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (*Mondaq*, 2008) <http://www.mondaq.com/unitedstates/x/58880/Human+Resources/Employment+And+Privacy+Issues+In+NonCompetition+Agreements> accessed 23 October 2016.

779 *TriState Courier & Carriage, Inc. v. Berryman,* No. C.A. 20574-NC, 2004 WL 835886 (Del. Ch. Apr. 15, 2004).

780 Ann Bevitt and Daniel P. Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (*Mondaq*, 2008) <http://www.mondaq.com/unitedstates/x/58880/Human+Resources/Employment+And+Privacy+Issues+In+NonCompetition+Agreements> accessed 23 October 2016.

781 California Business and Professions Code, art 16600.

782 Ann Bevitt and Daniel P. Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (*Mondaq*, 2008) <http://www.mondaq.com/unitedstates/x/58880/Human+Resources/Employment+And+Privacy+Issues+In+NonCompetition+Agreements> accessed 23 October 2016.

In Virginia, Courts interpret restrictive covenants as restrains of trade that are to be scrutinised.[783] According to the Virginia Supreme Court, a non-compete agreement is valid if the employer demonstrates that such agreement is no more than is necessary to protect his business interests, does not preclude the employee from earning a living, and is in accordance with public policy.[784] In Virginia, the 'reasonable alteration' approach has not been taken up.[785]

2.2 *France*

In France, the Courts pay particular attention to factors such as 'duration, geographical scope and the particular activity, the conditions in which the employer releases the employee from such obligation, the employee's role, the interests of the company and the financial compensation provided by the clause'.[786]

For a non-compete clause to be enforceable, it must,

> be limited to what is reasonably necessary to protect the employer's business; not unreasonably restrict the legitimate rights of the employee to find a new job; be reasonably limited in time and place; and oblige the employer to provide financial compensation for the restrictive covenant.[787]

The factor that the Courts in France give paramount importance to is whether the employee is precluded from earning a living in the same field or area of expertise. Therefore, even if the restriction is justified by the fact that it is protecting the legitimate interests of the employer, if such restriction would prevent the employee from working in the same field, the restrictive covenant would not be enforced.[788]

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783 *Northern Virginia Psychiatric Group, P.C. v. Halpern*, 19 Va. Cir. 279, 282 (1990) (non-solicitation agreement case); *Richardson v. Paxton Co.,* 203 Va. 790, 795 (1962).

784 Paramount Termite Control Co. vs. Rector,238 Va. 171, 174 (1989).

785 Ann Bevitt and Daniel P. Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (*Mondaq*, 2008) <http://www.mondaq.com/unitedstates/x/58880/Human+Resources/Employment+And+Privacy+Issues+In+NonCompetition+Agreements> accessed 23 October 2016.

786 Seyfarth Shaw, 'Webinar recap! International trade secret and non-compete law update' (*LEXOLOGY*, 2015) <http://www.lexology.com/library/detail.aspx?g=aafaf547-f85f-4b2a-b715-a88d266590ed> accessed 23 October 2016.

787 Ann Bevitt and Daniel P. Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (*Mondaq*, 2008) <http://www.mondaq.com/unitedstates/x/58880/Human+Resources/Employment+And+Privacy+Issues+In+NonCompetition+Agreements> accessed 23 October 2016.

788 ibid.

To confirm that there is a legitimate interest in enforcing the clause, it must be proven that through a breach of the non-compete clause, there is an actual risk of damage. The French Courts arrived to such conclusion after assessing whether there is competition between the two employers and whether there is really an actual threat imposed by the employee.[789]

Trade secrets are protected after the termination of employment subject to certain conditions. Unlike in confidentiality clauses,[790] there needs to be compensation for restrictive covenants, such as non-compete clauses, in order for these to be deemed enforceable.[791] This is clearly stated in several cases of the Labour Law Division of the French Supreme Court.[792]

2.3 *Germany*

In Germany, five conditions must be satisfied in order for non-compete clauses to be valid,

a) The restraint is to be imposed solely in order to protect the ex-employer's legitimate business interests;
b) the restrictive covenant is not to impose an unreasonable impediment for the employee to earn a living;
c) the non-compete clause is enforceable if the employer binds himself to pay financial compensation the employee which matches half the income earned prior to the termination of the employment;
d) the maximum duration of the clause is two years, and if a longer duration is agreed, the excess is invalid;
e) the restrictive covenant is to be in writing and the employer has the duty to prove that the employee is in possession of a copy of the signed contract.[793]

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789 ibid.

790 Seyfarth Shaw, 'Webinar recap! International trade secret and non-compete law update' (*LEXOLOGY*, 2015) <http://www.lexology.com/library/detail.aspx?g=aafaf547-f85f-4b2a-b715-a88d266590ed> accessed 23 October 2016.

791 Ann Bevitt and Daniel P. Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (*Mondaq*, 2008) <http://www.mondaq.com/unitedstates/x/58880/Human+Resources/Employment+And+Privacy+Issues+In+NonCompetition+Agreements> accessed 23 October 2016.

792 See *Vasilescu v. SARL Argo Hytos* (Labor Law Division, French Supreme Court, June 13, 2007), *X vs. Societe Publications Pierre Johanet* (Labor Law Division, French Supreme Court, March 7, 2007), *X. v. Societe Allegre* (Labor Law Division, French Supreme Court, February 27, 2007).

793 Ann Bevitt and Daniel P. Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (*Mondaq*, 2008) <http://www.mondaq.com/unitedstates/x/58880/Human+Resources/Employment+And+Privacy+Issues+In+NonCompetition+Agreements> accessed 23 October 2016.

2.4 *Italy*

Non-compete clauses are enforceable if three conditions are satisfied, namely (i) if they are founded in writing; (ii) if compensation is agreed to; and (iii) if the clause is limited to a particular purpose, time and location, as referred to in a local Maltese judgment ***Vassallo Cesareo vs. Cilia Pisani***.[794]

The applicable duration of the clause cannot exceed five years for employees holding an executive position, and three years in other situations. The compensation is to be fair and in proportion to the level of restriction imposed on the employee. Factors taken into consideration when quantifying the compensation are the duration of the clause, the geographic area covered by the clause, and the salary and position held by the ex-employee.[795]

2.5 *United Kingdom*

Restrictive covenants are more often than not void due to being considered as an unlawful restraint of trade. This is because *prima facie* they are against public policy.[796] According to Seyfarth Shaw,

> In practical terms, this means that such covenants are only likely to be enforceable where they are fairly short in duration, the restriction is narrowly focused on the employee's own personal activities (e.g. by geographical scope) and is specific to the commercial environment.[797]

The use of non-competition clauses in the United Kingdom is common. Generally speaking, they are enforceable if they are deemed to be reasonable, as long as regard is had to the employer, the employee and to the general public.[798] When it

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794 *Attilio Vassallo Cesareo u Saviour Coppini ghan-nom u in rapprezentanza tas-socjetà International Machinery Limited vs. Anthony Cilia Pisani*, per Mr Justice Sciberras, First Hall Civil Court, 31 January 2003.

795 Ann Bevitt and Daniel P. Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (*Mondaq*, 2008) <http://www.mondaq.com/unitedstates/x/58880/Human+Resources/Employment+And+Privacy+Issues+In+NonCompetition+Agreements> accessed 23 October 2016.

796 Ann Bevitt and Daniel P. Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (*Mondaq*, 2008) <http://www.mondaq.com/unitedstates/x/58880/Human+Resources/Employment+And+Privacy+Issues+In+NonCompetition+Agreements> accessed 23 October 2016.

797 Seyfarth Shaw, 'Webinar recap! International trade secret and non-compete law update' (*LEXOLOGY*, 2015) <http://www.lexology.com/library/detail.aspx?g=aafaf547-f85f-4b2a-b715-a88d266590ed> accessed 23 October 2016.

798 Ann Bevitt and Daniel P. Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (*Mondaq*, 2008) <http://www.mondaq.com/unitedstates/x/58880/Human+Resources/Employment+And+Privacy+Issues+In+NonCompetition+Agreements> accessed 23 October 2016.

comes to reasonableness, there are two factors to consider: firstly, that only the legitimate proprietary interests of the ex-employer are protected through such agreement;[799] and secondly, that the restraint is not in excess to what is necessary to protect the employer's interests.[800]

Whether financial compensation is provided is not taken into consideration in the United Kingdom when assessing the lawfulness of such clauses. What is important to the Court is the actual wording of the restrictive clause, irrespective of the intention of the parties.[801]

Since only the narrowly-interpreted trade secrets are safeguarded post-employment in the United Kingdom, employers provide all-encompassing employment contracts to protect information.[802]

Today, non-competition clauses focus more on the sphere of influence that an employee had rather than a particular geographical area. The restriction is to be only in such activities that the ex-employee was involved in with his ex-employer, and in those areas in which the previous and the present employer are in direct competition with each other. The lower the ex-employee is on the employment ladder of the ex-employer and the longer the duration of the covenant, the more hesitant the Court is to enforce such a restrictive non-compete clause.[803]

2.6 *Malta*

Currently there is no specific law that caters for restrictive covenants between an employer and an employee. As a result of this lacuna, financial compensation is not legally mandatory in such contracts, and therefore whether or not financial compensation is offered to the employee is to be decided between the employer and the employee. The loss suffered by the employer will be the main factor in determining whether the covenant is enforceable or not. Naturally, the enforceability of such clauses is in the discretion of the Court.[804]

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799 Stenhouse Ltd vs. Phillips [1974] AC 391.

800 Herbert Morris Ltd v. Saxelby [1916] AC 688

801 Seyfarth Shaw, 'Webinar recap! International trade secret and non-compete law update' (*LEXOLOGY*, 2015) <http://www.lexology.com/library/detail.aspx?g=aafaf547-f85f-4b2a-b715-a88d266590ed> accessed 23 October 2016.

802 ibid.

803 Ann Bevitt and Daniel P. Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (*Mondaq*, 2008) <http://www.mondaq.com/unitedstates/x/58880/Human+Resources/Employment+And+Privacy+Issues+In+NonCompetition+Agreements> accessed 23 October 2016.

804 Ann Bugeja, 'Protecting Business Interests Following Termination' (*GVZH Advocates*, 2013) <http://www.csb-advocates.com/malta-law-articles/protecting-business-interests-

The Constitution of Malta contains clauses on the freedom of occupation,[805] and freedom of property,[806] but there are no specific clauses governing the freedom to contract, intellectual property rights or trade secrets. Since there is no applicable statute relating to the enforceability of restrictive covenants, such issue must necessarily be analysed through local jurisprudence on the matter.[807] Non-compete clauses in Malta are enforceable according to certain criteria and conditions. It is common practice that in an employment agreement the employer inserts a non-compete clause, together with the applicable penalty should such a clause be breached. The Director responsible for Employment and Industrial Relations needs to approve the terms of the contract according to some local cases.[808] Other than that, damages can be sought by the employer for the breach of the non-compete clause in terms of the Civil Code.[809] An employer's protected interests mainly consist of trade secrets, together with customers/clients and business connections.[810]

There are several factors which one has to take cognisance of when it comes to determining the enforceability of the non-compete clause. Firstly, the clause needs to be in writing. The Court will then look at the duration of the restriction, the geographical area covered by the restriction, and other relevant factors. Moreover, to uphold the clause, the Courts must be convinced that the reasonableness test is met. The principle of freedom from restraints of trade is duly considered in Malta.[811]

In ***Patrick Jean vs. Omegachem Inc.***[812] the Court quoted Article 2089 of the Civil Code of Québec,[813] which provides that the clause needs to be in writing, and that factors such as time, place and type of employment are considered. Similar to Malta, blanket restrictive clauses are 'unacceptable at law'.[814]

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following-termination-icgl-employment-labour-law-2013-edition> accessed 23 October 2016.

805 See Constitution of Malta, Chapter 0 of the Laws of Malta, arts 7, 12.

806 ibid art 32.

807 ibid.

808 *Paul Pisani bhala Managing Director ghan-nom tas-socjetà Leisure Marketing Limited vs. Reuben Vella Bray*, per Mr Justice Said Pullicino, First Hall Civil Court, 5 October 1994.

809 Judge Abigail Lofaro, 'Non-competition clauses in labour contracts' (XIVth Meeting of Europoean Labour Court Judges, Cour de Cassation de Paris 2006) <http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/meetingdocument/wcms_159967.pdf> accessed 23 October 2016.

810 ibid.

811 ibid.

812 2012 QCCA 232 (C.A.).

813 Civil Code of Québec, art 1089.

814 Élodie Brunet, 'Can the refusal to sign a non-competition clause constitute just and sufficient cause for dismissal?' (In Fact and In Law, Lavery 2012) <http://www.lavery.ca/en/publications/our-publications/1532-can-the-refusal-to-sign-a-

Therefore 'a non-competition clause must be stipulated in writing and in express terms',[815] and the contractual obligation must be determinate or determinable, as per contract law.[816]

If a Maltese Court determines that a restrictive covenant is too broad, it will normally not modify it, neither will it enforce such an agreement. Temporary preliminary injunctions may be issued by the Maltese Courts on occasions of a breach of a non-compete clause, but only if the 'reasonable test' criteria is satisfied. In cases of such breaches, the Court can order the payment of the fine agreed in the employment contract or liquidate damages to be paid to the employer. In Malta, the Courts that are vested with the authority to deal with such cases are the Industrial Tribunal, the First Hall of the Civil Court, and the Court of Appeal.[817]

In ***Pisani nomine vs. Vella Bray***,[818] the Court held that clauses in restraint of trade are not to contain any phrases suggesting that the restraint is to be applied subsequent to the termination of employment 'for any reason whatsoever'. The Court stated that in order for a restrictive clause not to compete to be enforceable, it needs to be in line with its object, expressly mentioning the prohibited work to be carried out post-termination. Therefore, the restraint is to be proportional, with no overboard measures than necessary to protect the interests of the employer. Moreover, ex-employer and the employer do not compete, then there are no employer's interests to protect.[819]

Vassallo Cesareo vs. Cilia Pisani[820] stated that restrictive covenants are considered to be 'almost unenforceable against all classes of employees'.[821] Alterations in position, salary or responsibilities do not affect enforceability, but

non-competition-clause-constitute-just-and-sufficient-cause-for-dismissal-.html> accessed 23 October 2016.

815 ibid.

816 ibid.

817 Judge Abigail Lofaro, 'Non-competition clauses in labour contracts' (XIVth Meeting of Europoean Labour Court Judges, Cour de Cassation de Paris 2006) <http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/meetingdocument/wcms_159967.pdf> accessed 23 October 2016.

818 *Paul Pisani bhala Managing Director ghan-nom tas-socjetà Leisure Marketing Limited vs. Reuben Vella Bray*, per Mr Justice Said Pullicino, First Hall Civil Court, 5 October 1994.

819 Judge Abigail Lofaro, 'Non-competition clauses in labour contracts' (XIVth Meeting of Europoean Labour Court Judges, Cour de Cassation de Paris 2006) <http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/meetingdocument/wcms_159967.pdf> accessed 23 October 2016.

820 *Attilio Vassallo Cesareo u Saviour Coppini ghan-nom u in rapprezentanza tas-socjetà International Machinery Limited vs. Anthony Cilia Pisani*, per Mr Justice Sciberras, First Hall Civil Court, 31 January 2003.

821 Matthew Brincat, 'Labor and Employment Practice Group Non-Competition' (Lex Mundi Publication 2010) <http://www.lexmundi.com/document.asp?docid=1504> accessed 23 October 2016.

before this decision, cases were considered according to the reasonableness test. Judgments decided before this decision stated that an employee ought to be compensated for abiding with a restrictive covenant, with the reason based on equity, but such a reason was declared to be contrary to Malta's public policy.[822]

3. Overview of the position in Malta through Jurisprudence

In ***Joseph Xerri nomine vs. Brian Clarke***, the defendant was subjected to a non-compete clause reading,

> You will be required to guarantee, that if you leave this employment you will not work for any other research organization or any other organization in Malta, whose activities are in competition with those of this Company, before the lapse of at least three years.[823]

The Commercial Court in 1969 proceeded to state,

> There is no specific provision of codified law in Malta about clauses in restraint of trade as such, and jurisprudence or judicial precedent is not apparently abundant, but it may safely be asserted that if clauses in restraint of trade may be impugned at all - and they certainly can in deserving cases - the heading under which an exercise of this sort may be attempted is section 1028 (today Article 985) of the Civil Code which provides that things which are impossible, or prohibited by law, or contrary to morality, or to public policy, may not be the subject-matter of a contract.[824]

One has to take into consideration that this judgment was handed down some time ago and since then there have been several cases addressing the issue of restrictive covenants. Nevertheless, it accepts the notion of non-compete clauses in particular cases and subject to the mentioned criteria.
Several cases, including the ***Joseph Xerri nomine vs. Brian Clarke*** case refer to ***Carmelo Zammit La Rosa vs. Franco Facchetti***,[825] where the Court stated that 'clauses which restrict a man's working activities to a limited space or time are not, on the test of reasonableness, to be held null and void'.[826] The Court enforced such clause because the employee was not precluded entirely from

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822 ibid.
823 *Joseph Xerri nomine vs. Brian Clarke*, per Mr Justice Caruana Demajo, Commercial Court, 31 July 1969.
824 ibid.
825 *Carmelo Zammit La Rosa vs. Franco Facchetti*, per Mr Justice Mamo, Mr Justice Montanaro Gauci, Mr Justice Harding, Court of Appeal (Superior), 15 December 1961.
826 ibid.

working in his profession, but he could only not work with any competitors of his ex-employer.[827]

In ***Pisani vs. Vella Bray***,[828] the Court analysed a contract of employment containing a clause providing that if for whatever reason, employment is terminated, the ex-employee would be unable to work with a competitor for a period of three years, while a pre-determined sum of money was to be paid if the non-compete clause was breached.[829] The Court stated, 'Huwa dan it-test tar-raġonevolezza fl-imkien mal-prinċipji tal-ordni pubbliku, wkoll maġistralment elaborata f'din is-sentenza, li għandhom ikunu determinanti għall-validità o meno ta' klawsoli simili'.[830]

In several cases, including in the above-mentioned case, Article 987 and 990 of the Civil Code were taken into consideration, whereby obligations without consideration or founded on a false or an unlawful consideration are without effect,[831] while a consideration which is prohibited by law, or contrary to morality or public policy is unlawful.[832] In ***Vassallo Cesareo vs. Cilia Pisani***,[833] the Court started with the premise that whatever is agreed between two parties is the law,[834] thus any breach results in a contractual breach remediable through payment of damages or penalties. However, that alone does not make non-compete clauses enforceable. As Baudry holds, non-compete clauses have to be interpreted in favour of the employee.[835]

In ***Vassallo Cesareo vs. Cilia Pisani***,[836] the Court stated that there is the right of the employer to protect its commercial interests such as trade secrets, in order to preclude misuse by employees. The restriction is to be related to the nature of employment. The employer is given more protection in the case of employees in a high position. The restrictive clause is to limit the activity of the employee for a duration and geographic area that is within reason. The Court stated that

827 ibid.

828 *Paul Pisani bhala Managing Director ghan-nom tas-socjetà Leisure Marketing Limited vs. Reuben Vella Bray*, per Mr Justice Said Pullicino, First Hall Civil Court, 5 October 1994.

829 ibid.

830 ibid.

831 Civil Code, Chapter 16 of the Laws of Malta, art 987.

832 ibid art 990.

833 *Attilio Vassallo Cesareo u Saviour Coppini ghan-nom u in rapprezentanza tas-socjetà International Machinery Limited vs. Anthony Cilia Pisani*, per Mr Justice Sciberras, First Hall Civil Court, 31 January 2003.

834 Civil Code, Chapter 16 of the Laws of Malta, art 922(1): Contracts legally entered into shall have the force of law for the contracting parties.

835 Gabriel Baudry-Lacantinerie, *Trattato Teorico-Pratico del Diritto Civile*, vol 21 (Larose 1907) 51 para 1712.

836 *Attilio Vassallo Cesareo u Saviour Coppini ghan-nom u in rapprezentanza tas-socjetà International Machinery Limited vs. Anthony Cilia Pisani*, per Mr Justice Sciberras, First Hall Civil Court, 31 January 2003.

restricting the employee post-employment was justified, to safeguard the employer's patrimonial interests. However, the rights of the employee were not catered for adequately. The Court mentioned financial compensation aimed at making up for the sacrifice borne by the employee.[837] Moreover, when considering the reasonableness test, the geographic criterion in Malta fails due to Malta being a small island.[838]

In ***Vassallo Cesareo vs. Cilia Pisani***[839] the Court held,

> Filwaqt li ġie rikonoxxut id-dritt ta' min iħaddem illi jipproteġi l-interessi kummerċjali tiegħu għad dawk li huma 'trade secrets' u li jinibixxi 'the misuse by the employee of his acquaintance with the employer's clients or customers' eppure il-kostringiment irid ikun relatat man-natura ta' l-impjieg fejn allura min iħaddem jiġi akkordat ħarsien akbar fil-każ ta' impjegat f'kariga għolja, ad exemplum, 'managing director'. Inoltre l-patt tar-restraint irid jillimita l-attivita` lavorattiva jew industrijali ta'l-mpjegat għal żmien jew ċirkondarju determinat li ma jkunx irraġjonevoli[840]

The Court of Appeal in ***Vassallo Cesareo vs. Cilia Pisani*** stated that the position in other legal systems does not influence local decisions. Consequently, references to compensation under Italian law are inapplicable, as they are not provided for under Maltese law.[841] The Court of Appeal focused on Articles 987 and 990 of the Civil Code, along with the Conditions of Employment (Regulations) Act (Hereinafter referred to as 'CERA').[842] Articles 38 and 26 of the CERA are aimed at safeguarding the interests of the employee because conditions which are less favourable than those which the Act establishes cannot be imposed and to see that no penalties are included in a contract without the authorisation of the Director. The Act limits the will of the contracting parties in the interest of the public, and what is in excess is thus without affect. In this case

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837 As required by the Civil Code of Italy.

838 *Attilio Vassallo Cesareo u Saviour Coppini ghan-nom u in rapprezentanza tas-socjetà International Machinery Limited vs. Anthony Cilia Pisani*, per Mr Justice Sciberras, First Hall Civil Court, 31 January 2003.

839 ibid.

840 *Attilio Vassallo Cesareo u Saviour Coppini ghan-nom u in rapprezentanza tas-socjetà International Machinery Limited vs. Anthony Cilia Pisani*, per Mr Justice Sciberras, First Hall Civil Court, 31 January 2003.

841 *Attilio Vassallo Cesareo u Saviour Coppini ghan-nom u in rapprezentanza tas-socjetà International Machinery Limited vs. Anthony Cilia Pisani*, per Mr Justice De Gaetano, Mr Justice Depasquale, Mr Justice Magri, Court of Appeal (Superior), 3 March 2006.

842 Conditions of Employment (Regulations) Act, Chapter 135 of the Laws of Malta.

the non-compete clause and the penalty clause were found to be illicit and prohibit by law as the Director did not authorise the penalty.[843]

In ***Cascun vs. Healthcare Services Limited***, the Court analysed post-employment restraints and stated that such clauses,

> huma marbutin bil-limitazzjoni li jistgħu jitħallew isiru biss jekk kemm-il darba l-prinċipal ikun jeħtieġlu jħares l-interessi kummerċjali tiegħu u li f'kull każ dan ma jkunx bi ksur tal-ħarsien tal-jedd tal-impjegat għad-dritt li jaħdem b'mod produttiv.[844]

In ***Portelli vs. Air Malta***, the Court stated, 'Il-klawsola tista' titqies irraġonevoli li kieku kienet miftuħa għal żmien li ma jagħlaqx, jew jekk l-ammont ikun wieħed sproporzjonat, jew imur kontra l-ordni pubbliku'.[845]

The special laws on conditions of employment are heavily scrutinised by the Maltese Courts when non-compete clauses along with penalties are utilised by employers. In ***Pisani vs. Vella Bray***, the Court stated that where the penalty is considered, employment laws kick in – at that time through Chapter 135 of the Laws of Malta.[846] Where penalties are concerned, they may be enforced but with the permission of the Director.[847] Since the Director did not authorise the penalty imposed in the non-compete clause of this case, such a clause was determined to be contrary to the spirit of the law.[848] The applicable law is the law at the time of entry into contract, and no subsequent law.[849] Having clauses breaching the Act would render such clause or the whole agreement as null.[850]

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843 *Attilio Vassallo Cesareo u Saviour Coppini ghan-nom u in rapprezentanza tas-socjetà International Machinery Limited vs. Anthony Cilia Pisani*, per Mr Justice De Gaetano, Mr Justice Depasquale, Mr Justice Magri, Court of Appeal (Superior), 3 March 2006.

844 *Lorenza sive Lora Cascun vs. Healthcare Services Limited*, per Mr Justice Micallef, First Hall Civil Court, 6 March 2008, p. 13.

845 *Ramon Portelli, Joseph Xuereb, Simon Warrington u Ian Alexander Micallef vs. Air Malta p.l.c.*, per Mr Justice Micallef, First Hall Civil Court, 5 March 2013, p. 11.

846 The Conditions of Employment (Regulations) Act, Chapter 135 of the Laws of Malta, was consolidated into the Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta, in 2002.

847 Employment and Industrial Relations Act 2002, Chapter 452 of the Laws of Malta, art 19.

848 *Paul Pisani bhala Managing Director ghan-nom tas-socjetà Leisure Marketing Limited vs. Reuben Vella Bray*, per Mr Justice Said Pullicino, First Hall Civil Court, 5 October 1994.

849 *Neg. Victor Salamone nomine vs. Dr Giuseppe Mifsud Speranza et noe*, per Mr Justice Ganado, Commercial Court, 12 November 1934.

850 *Avukat Dr. Hugh Peralta nomine vs. Vincent Falzon et nomine*, per Mr Justice Agius, Mr Justice Harding, Mr Justice Schembri, Court of Appeal (Commercial), 19 May 1986.

In ***Bugeja pro et nomine vs. Grech,***[851] the First Court stated that if a contract satisfies Article 966 of our Civil Code, in that, the capacity, consent, object and consideration, it cannot be declared null and void because the will of the contracting parties is demonstrated.[852] As declared in other cases, where penalties and conditions less favourable than those found in the law are imposed, there has to be the authorisation of the Director of Works, and if not, this renders the clause as null and void.[853]

However, the Court of Appeal stated that the agreed sum was a pre-agreed amount, thus pre-liquidated damages, and therefore not the same as fines. Therefore, Article 19 of the Employment and Industrial Relations Act was deemed to be inapplicable. The Court concluded that the clause was not a restraint of trade. The reasons for finding the clause to be reasonable include the agreed duration of the clause, the voluntary acceptance by the employee, the reasonable damages to be paid in the eventuality of breaching the clause, and the fact that the employee is not inhibited from earning a living or working from competitors, only not to work with clients of the company.[854]

Blanket clauses which aim to cover every circumstance possible, such as those which disregard the manner in which the employment is terminated, and those providing that the employee cannot engage in a similar activity to that of his previous employer, are considered to beyond what is reasonable.[855]

4. Foreign positions on non-compete clauses as analysed through local jurisprudence

Since local law on the subject is lacking, foreign jurisprudence plays a fundamental role when considering non-compete clauses in Malta and several cases discuss foreign positions at length. In ***Vassallo Cesareo vs. Cilia Pisani,***[856] the position in the United Kingdom was referred to, where initially such clauses were deemed invalid, but later the concept of 'partial restraint if reasonable and

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851 *Mark Bugeja, Martin Bonello Cole, Austin Demajo u Joseph Pullicino f'isimhom proprju u f'isem u fl-interess tad-ditta Grant Thornton vs. Melljora Grech*, per Magistrate Scerri Herrera, Court of Magistrates (Civil Jurisdiction), 20 June 2012.

852 ibid p. 12.

853 *Brian Richard Andrews et vs. Alfred Borg*, per Mr Justice Cuschieri, First Hall Civil Court, 31 October 2003.

854 *Mark Bugeja Martin Bonello Cole, Austin Demajo u Joseph Pullicino f'isimhom u fl-isem u fl-interess tad-ditta Grant Thornton vs. Melljora Grech*, per Ms Justice Grima, Court of Appeal (Inferior), 27 May 2015.

855 *Paul Pisani bhala Managing Director ghan-nom tas-socjetà Leisure Marketing Limited vs. Reuben Vella Bray*, per Mr Justice Said Pullicino, First Hall Civil Court, 5 October 1994.

856 *Attilio Vassallo Cesareo u Saviour Coppini ghan-nom u in rapprezentanza tas-socjetà International Machinery Limited vs. Anthony Cilia Pisani*, per Mr Justice Sciberras, First Hall Civil Court, 31 January 2003.

not contrary to the public interest' was accepted.[857] In ***Pisani vs. Vella Bray***, the Court referred to the concept of restraints of trade as defined by English jurists as,

> *a legal device to attempt to hold the balance between two competing features, an employee's freedom to take employment as and when he wishes, and an employer's interest in preserving certain aspects of his business from disclosure or exploitation by an employee or more usually by an ex-employee...*[858]

In the ***Nordenfelt case***,[859] four particular points are raised. Firstly, restraints of trade, unless justified, are against public policy, and thus are void. Secondly, it is the Court that decides whether a restraint of trade is justified or not, and, if it is found not to be justifiable, then the Court will not enforce it. Thirdly, a restraint is justifiable if it is reasonable in the interests of both contracting parties and in the public's interest. Fourthly, the burden of proof to justify a restrictive clause is on the party alleging that it is reasonable.[860]

Lord Wedderbum mentions the reasonableness test, on whose failure a restrictive clause would be unenforceable. The test is 'by reference to the interests of the parties to the contract'.[861] Factors considered include the area and the duration of the clause, as long as in the public interest. It is only the 'employer's proprietary interests' that can be safeguarded. [862]

CRC - Evans Canada Ltd vs. Pettifier,[863] holds that the employee is to be honest and faithful. Moreover, 'The employee shall not follow a course of action that harms of places at risk the interests of the employer.'[864]

The Court of Appeal of Manitoba, Canada holds that, 'There is nothing to prevent an ordinary employee from terminating his employment, and normally that employee is free to compete with his former employer. The right to compete freely may be constrained by contract.'[865]

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857 Jack Beatson FBA, Andrew Burrows FBA and John Cartwright, *Anson's Law of Contract* (23rd edn, Oxford: Clarendon Press 1969) 333.
858 J. T. Smith & J. C. Wood, *Industrial Law* (London 1989) 132.
859 *Nordenfelt vs. Maxim Nordenfelt Guns and Ammunition Co. Ltd*, [1894] AC 535.
860 Jack Beatson FBA, Andrew Burrows FBA, and John Cartwright, *Anson's Law of Contract* (23rd edn, Oxford: Clarendon Press 1969) 335-336.
861 Baron Kenneth William Wedderburn Wedderburn of Charlton, *The Worker and the Law* (Penguin 1986) 146.
862 ibid.
863 *CRC – Evans Canada Ltd vs. Pettifier* ((1997), 197 A. R. 24 (Q.B.)).
864 ibid.
865 *W.J. Christie & Co. vs. Greer* ((1981), 121 D.L.R. (3d) 472 (Man. C.A.).

5. Conclusion

Maltese law is silent on the matter of non-compete clauses and therefore one must look to relevant provisions on contracts in the Civil Code, as well as the special laws governing conditions of employment. Due to this lacuna, Malta also takes cognisance of the position in other countries when coming to decisions for local cases, particularly the positions of the United Kingdom and Italy.

There are two interests at stake when determining the enforceability of non-compete clauses; the interests of the employer – to safeguard his legitimate patrimonial interests; and the right of the employee to work. Sometimes, these interests overlap and therefore such clauses have to be subjected to the reasonableness test in order to be justified. Baudry holds that a clause in restraint of trade should be interpreted in a way as to favour the employee.[866] It is a general principle that contract clauses in breach of public policy cannot be enforced.

Norman Selwyn states that there are 'four legitimate interests in respect of which the employer is entitled to limited protection, namely (a) trade secrets and confidential information, (b) existing customers and connections, (c) working for competitors, and (d) enticing existing employees'.[867]

Non-compete clauses in Malta can be seen from two points of views. Firstly, there are employment laws which have to be safeguarded, especially if the application of penalties is involved; although it always is up to the Court to decide whether such special laws are applicable or not. Secondly, the Maltese Courts use the reasonableness test, as advocated by other jurisdictions, as well as the doctrine and jurisprudence of other systems, particularly those of the United Kingdom and Italy.[868]

The position in Malta on non-compete clauses is best summarised in ***Portelli vs. Air Malta***, 'Il-klawsola tista' titqies irraġonevoli li kieku kienet miftuħa għal

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866 Gabriel Baudry-Lacantinerie, *Trattato Teorico-Pratico del Diritto Civile*, vol 21 (Larose 1907) 51 para 1712.

867 Norman Selwyn, *Selwyn's Law of Employment* (15th edn, OUP 2008) 19-24.

868 Dr Joseph Bonello, 'Clauses in restraint of trade' (Department of Industrial and Employment Relations Issue 1, 2006) <https://dier.gov.mt/en/About-DIER/Publications-and-Archives/Newsletter/Documents/IReview_Issue1.pdf> accessed 23 October 2016.

żmien li ma jagħlaqx, jew jekk l-ammont ikun wieħed sproporzjonat, jew imur kontra l-ordni pubbliku'.[869]

A non-compete clause covering the whole of Malta was once declared invalid in relation to a Maltese citizen.[870] The duration in such clauses has to be definite and not open-ended or too broad.

Bugeja et vs. Camilleri, is one of the most recent decided cases on such clauses, thus it deserves scrutiny. The Court stated: 'illi l-linja gwida ta' kull kundizzjoni li timponi r-restrizzjoni lavorativa ta' impjegat huma r-raġonevolezza tal-kundizjoni f'sens ampju u l-iskop limitat fi spazju u żmien tar-restrizzjoni'.[871]

The Court declared that the imposed limitation in the contract was a condition that was not unreasonable, capricious or generic, that completely restricts the capacity of the employee to work in the particular field. The employee was only precluded from working with clients of the ex-employer. Therefore, the ex-employee was in a position to work alone, with a company or other persons in the same field, even if competitors, unless they were clients of the ex-employer. This Court referred to the clause analysed in ***Vassallo Cesareo noe vs. Cilia Pisani***, because in such a case the condition was a generic restriction and therefore the employee was precluded from working anywhere for the duration of the restriction.

The Court referred to the period of two years agreed to in the condition as being a short one, thus reasonable. The penalty agreed to was an amount of damages intended as a deterred so that the employee does not breach the condition, and the quantum of pre-liquidated damages was also reasonable in itself.[872]

As regards penalty clauses, the same Court mentioned several factors to take into consideration, among which is that the penalty amount must not eliminate the employee's freedom to take up employment somewhere. The role and the salary of the employee and the level of trust placed on an employee are to be considered as well. Finally, the amount must be generally fair and reasonable in the context of the employment in question.[873]

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869 *Ramon Portelli, Joseph Xuereb, Simon Warrington u Ian Alexander Micallef vs. Air Malta p.l.c.*, per Mr Justice Micallef, First Hall Civil Court, 5 March 2013, p. 11.

870 *Attilio Vassallo Cesareo u Saviour Coppini ghan-nom u in rapprezentanza tas-socjetà International Machinery Limited vs. Anthony Cilia Pisani*, per Mr Justice Sciberras, First Hall Civil Court, 31 January 2003.

871 *Mark Bugeja, Martin Borg Bonello Cole, Austin Demajo u Joseph Pullicino f'isimhom proprju fl-isem u l-interess tad-ditta Grant Thornton vs. Geoffrey Camilleri*, per Mr Justice Chetcuti, Court of Appeal, 13 February 2014, p. 7.

872 ibid p. 9.

873 ibid.

To conclude, Maltese Courts seem to understand the importance of non-compete clauses and penalty clauses in contracts, in order to safeguard the legitimate interests of the employer in today's increasingly competitive industries.

Non-solicitation clauses

1. Introduction

Non-solicit and non-compete clauses are less likely to be enforced by a Court than confidentiality agreements because they are more onerous to the ex-employee.[874]

In ***First United Insurance Brokers Limited vs. Farrugia Wismayer***,[875] one may find a typical non-solicitation clause and a corresponding penalty clause catering for such breach,

> (a) Should the employment of the Employee be terminated for any reason by the Employer or the Employee, the Employee undertakes as of now that for a period of twenty-four months after the termination of his employment, he shall not for his account or for any other person, firm or company, solicit or interfere or endeavour to entice away from the Employer any person who may be employed with the Employer or may be a client of the Employer.
> (b) In the event that a breach of sub-clause 12(a) above, the employee agrees that he will be liable for damages, which are being pre-agreed now by the parties, in the sum of Lm 5000 (five thousand Maltese Liri) for every such breach.[876]

In the case ***Gilford Motor Co. Ltd vs. Horne*** Romer LJ stated,

> It is in my opinion established that when an employee is being offered employment which will probably result in his coming into contact with his employer's customers, or which will enable him to obtain knowledge of names of his employer's customers, then the covenant against solicitation is reasonably necessary for the protection of the employer. [877]

However, such a stance was criticised because the fact that an employee is in contact with his customers does not automatically translate into those customers being ready to follow him.[878]

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874 Mary L. Mikva, 'Drafting Confidentiality, Non-Compete and Non-Solicitation Agreements: the Employee's Wish List' (2004) 50 Practical Lawyer 11.
875 *First United Insurance Brokers Limited vs. Karl Farrugia Wismayer*, per Mr Justice Zammit McKeon, First Hall Civil Court, 30 November 2010.
876 ibid p. 6.
877 *Gilford Motor Co. Ltd vs. Horne* [1933] Ch 935.
878 ibid.

According to the Illinois Appellate Court in ***Coady vs. Harpo***,[879]

> A post-employment restrictive covenant will be enforced if its terms are reasonable. ...The reasonableness of some types of restrictive covenants, such as non-solicitation agreements, also is evaluated by the time limitation and geographical scope stated in the covenants.[880]

There are two types non-solicitation agreements, firstly, agreements not to solicit employees, and secondly, agreements not to solicit clients.[881]

2. Agreements not to solicit clients

Agreements not to solicit clients function, to some extent, as non-compete agreements and may likewise impact the employee's capability of finding employment elsewhere in the same sector. Therefore, for the clause to be considered enforceable in employment contracts, the geographic area, duration, and scope have to be reasonable in order to be upheld by a court of law.[882] This was confirmed in ***Bugeja et vs. Camilleri***.[883]

Norman Selwyn in *Law of Employment* states,

> An employer is entitled to have a limited protection against an ex-employee dealing with existing customers for this is part of the goodwill which has been built over the years. A covenant can restrict the right to solicit or endeavour to entice away former customers, or to have post-employment dealing such customers, but it is likely that such clauses should be limited to customers with whom the ex-employee had some dealings for otherwise the restraint is likely to be regarded as to be designed to prevent competition (Marley Tile Co Ltd vs. Johnson – 1982 IRLR 75, CA).[884]

Selwyn adds, 'A restrictive covenant that prevents an employee from soliciting or accepting business from his former employer's customers will be unenforceable

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879 *Coady vs. Harpo*, 719 N.E.2d 244 250 (Ill. App. Ct. 1999)

880 ibid.

881 Mary L. Mikva, 'Drafting Confidentiality, Non-Compete and Non-Solicitation Agreements: the Employee's Wish List' (2004) 50 Practical Lawyer 11.

882 Baron Kenneth William Wedderburn Wedderburn of Charlton, *The Worker and the Law* (Penguin 1986) 146.

883 *Mark Bugeja, Martin Borg Bonello Cole, Austin Demajo u Joseph Pullicino f'isimhom proprju fl-isem u l-interess tad-ditta Grant Thornton vs. Geoffrey Camilleri*, per Mr Justice Chetcuti, Court of Appeal, 13 February 2014, p. 7.

884 Norman Selwyn, *Selwyn's Law of Employment* (19th edn, OUP 2016) 510.

if it extends to customers with whom the employee personally had no dealings'.[885]
Therefore, according to Selwyn non-solicitation clauses ought to be restricted to customers that the ex-employee dealt with personally, since in any other case, such clause would be posing an obstacle to competition.[886]

In fact, in ***First United Insurance Brokers Limited vs. Farrugia Wismayer***, the Court reiterated this principle and although the employee was employed as a Development Manager, the clause in question was not specific enough and it was therefore interpreted in favour of the employee. In order for such clause to be enforceable by a court of law, it must be specific, that is, it must refer to the clients with whom the employee had dealings. As a result, the Court decided to render the clause ineffective and unenforceable.[887]

3. Agreements not to solicit employees

Regarding the second type of non-solicitation clause, Selwyn holds, 'A covenant which purports to restrict the right of an employee to solicit or entice other employees to leave the employer`s employment and to work for another employer is generally void.'[888]

In ***Hanover Insurance Brokers Ltd vs. Schapiro,***[889] a restrictive covenant stipulated that for the duration of a year post-employment, the ex-employee would not 'solicit or entice any employees of the company to the intent or effect that such employee terminates that employment'.[890] When the employer attempted to restrain the ex-employee for breaching the clause, the Court held that an employee is entitled to work with whoever provides employment, and therefore an employee is not to be compared with any other assets of the employer, like stock in trade and customers.[891]

In ***TCS Europe UK Ltd vs. Massey***[892] the Court stated,

> A restriction which is sought to prevent a person from poaching employees irrespective of their expertise, technical knowledge and/or juniority, and which could also apply to employees who were not in the

885 *WRN Ltd vs. Ayris*, 2008 152(23) SJLB 29
886 Norman Selwyn, *Selwyn's Law of Employment* (19th edn, OUP 2016) 511.
887 *First United Insurance Brokers Limited vs. Karl Farrugia Wismayer*, per Mr Justice Zammit McKeon, First Hall Civil Court, 30 November 2010, p. 12, 13.
888 Norman Selwyn, *Selwyn's Law of Employment* (19th edn, OUP 2016) 511.
889 Hanover Insurance Brokers Ltd vs. Schapiro (1994 – IRLR 82, CA).
890 ibid.
891 ibid.
892 *TCS Europe UK Ltd vs Massey* [1999] IRLR 22.

> particular employment when the defendant left was clearly a restriction against competition and therefore void.[893]

In ***Anthony Caruana & Sons Limited vs. Christopher Caruana***,[894] the defendant was an ex-employee of the plaintiff company and after his employment was terminated, a contract was entered into, whereby he promised his 'continued goodwill' towards the company. However, no non-compete or non-solicitation clauses, and consequently, no penalty clauses, were agreed between the parties. Caruana was accused of approaching brands with whom the company conducted business, in order for them to cease such trade and be represented by him, after he left the plaintiff company. Moreover, Caruana allegedly solicited other employees of the plaintiff company. The issue of fiduciary obligations was raised in front of the Court, that is, whether the defendant was considered to be a fiduciary, and if so, whether he had breached such obligations.

When analysing breaches of fiduciary obligations, the Court quoted Article 1124A(1) of the Civil Code,

> 1124A. (1) Fiduciary obligations arise in virtue of law, contract, quasi-contract, trusts, assumption of office or behaviour whenever a person (the "fiduciary") –
> (a) owes a duty to protect the interests of another person; or
> (b) holds, exercises control or powers of disposition over property for the benefit of other persons, including when he is vested with ownership of such property for such purpose; or
> (c) receives information from another person subject to a duty of confidentiality and such person is aware or ought, in the circumstances, reasonably to have been aware, that the use of such information is intended to be restricted.[895]

A fiduciary is obliged to retain information that is passed on to him in a professional manner. There exists a duty of loyalty while at the same time safeguarding the interests of the employer. A fiduciary is to act with honesty, accountability and loyalty, and with the diligence of a *bonus paterfamilias*.[896]

In ***Anthony Caruana & Sons Limited vs. Christopher Caruana***, the Court of Appeal acknowledged that Article 1124A entered into force in our law in 2005,

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893 ibid.

894 *Anthony Caruana & Sons Limited (C 7512) vs. Christopher Caruana*, per Mr Justice Camilleri, Mr Justice Mallia, Mr Justice Azzopardi, Court of Appeal (Superior), 28th February 2014.

895 Civil Code, Chapter 16 of the Laws of Malta, art 1124A(1).

896 *Anthony Caruana & Sons Limited (C 7512) vs. Christopher Caruana*, per Mr Justice Camilleri, Mr Justice Mallia, Mr Justice Azzopardi, Court of Appeal (Superior), 28th February 2014, p. 37.

but it is a reproduction of principles dating back to Roman law.[897] Through a quotation of a 2007 case, ***Cordina vs. Cordina***,[898] this was further substantiated, because it was said that after the introduction of Article 1124A, the position in Malta 'ġiet ħafna aktar iċċarata'.[899] As stated in ***Messina vs. Galea*** [900] Roman law is still the ius commune, and 'nei casi non proveduti dalle nostre leggi, dobbiamo ricorrere alle leggi Romane'.[901]

The manager is still a fiduciary, even if not responsible for policy-making, and thus has to act with loyalty and good faith.[902] This is paralleled with the agreement between the plaintiff and the defendant in that the ex-employee acts with 'continued goodwill towards the company'.[903] Therefore, the Court of Appeal liquidated damages due to the company as a result of the breach of Caruana's fiduciary obligations.

4. Conclusion

One may reach the conclusion that, in order for non-solicitation clauses to be enforced by a court of law, they must satisfy the reasonableness test. In other words, they must be reasonable in terms of scope, duration, and geographic area. Both types of non-solicitation clauses are based on the principle that the interests of the employer and those of the employee are balanced, as stated in ***Zammit La Rosa nomine vs. Facchetti***.[904] This results in clauses ensuring that ex-employees do not siphon clients from ex-employees or attract other employees to start working with such employee, provided that such clauses are proportionate and reasonable, in that, they are tailor-made for the particular employee and are not too generic in scope.

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897 R. W. Lee, *The Elements of Roman Law* (4th edn, Sweet & Maxwell 1956).

898 *Joanne Cordina vs. Charles Cordina*, per Mr Justice Ellul, First Hall Civil Court, 26 September 2007.

899 ibid p. 10.

900 *Messina vs. Galea*, First Hall Civil Court, 5 January 1881.

901 ibid.

902 David J. Hayton, *The Law of Trusts* (Sweet and Maxwell 1998) 760.

903 *Balkiah vs. KPMG* [1999] 1AllER 517.

904 *Carmelo Zammit La Rosa vs. Franco Facchetti*, per Mr Justice Mamo, Mr Justice Montanaro Gauci, Mr Justice Harding, Court of Appeal (Superior), 15 December 1961.

Severability Clauses

1. Introduction

A classic example of a severability clause, also known as ***Salvatorius*** clause,[905] will read as follows, 'the provisions of this agreement are severable. If any provision is deemed to be invalid, void or unenforceable, the remaining provisions shall not as a result be invalidated.'[906]

2. Definition

Cheshire and Fifoot define the doctrine of severance as 'the rejection from a contract objectionable promises or the objectionable elements of a particular promise, and the retention of those promises or those parts of a particular promise that are valid'.[907]

Therefore, severability clauses promote the idea that provisions constituting a contractual agreement are independent of one another.[908] Consequently, if one or more of the aforementioned provisions, for some reason or other, are deemed to be illegal by a Court or competent authority, hence unenforceable; the residual agreement will remain valid and effective nonetheless.[909] These clauses do not only appear in a context of contracts, but also in the ambit of legislation[910] since their presence will prevent the revocation of the whole contract or statute.

This doctrine may operate in two manners. Firstly, when the Court rules out the entire restraint, retaining the valid residual part of the contract, as occurred in ***Scorer vs. Seymour Jones.***[911]

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905 'Salvatorius Clause Law & Legal Definition' (*USLegal*) <http://definitions.uslegal.com/s/salvatorius-clause/> accessed 28 October 2016.

906 Fisher Philips, 'Caution required: severability clauses in non-compete agreements' (*Lexology*, 31 August 2010) <http://www.lexology.com/library/detail.aspx?g=928b9886-3db5-4709-b1f3-9a039f949041> accessed 8 October 2015.

907 Cheshire and Fifoot, *Cheshire and Fifoot's Law of Contract* (16th edn, OUP 2012) 112.

908 'Severability' (*ContractStandards*) <http://www.contractstandards.com/clauses/severability> accessed 28 October 2016.

909 Chadbourne & Parke LLP (*Lexology*, 29 May 2012) 'Boilerplate matters: severability clauses' <http://www.lexology.com/library/detail.aspx?g=b23155c6-add5-4aa6-b6bc-a5ebc63f5539> accessed 28 October 2016.

910 Fisher Philips, 'Caution required: severability clauses in non-compete agreements' (*Lexology*, 31 August 2010) <http://www.lexology.com/library/detail.aspx?g=928b9886-3db5-4709-b1f3-9a039f949041> accessed 8 October 2015.

911 *Scorer vs. Seymour-Johns* [1966] 1 WLR 1419.

Or else, when the Court deletes or modifies the restraint making it reasonable and enforceable, as exemplified in the ***Nordenfelt case***[912] and ***Bromley vs. Smith***.[913]

3. Local Jurisprudence

Intertwined with the above is the enforceability of non-compete covenants. In Malta, this is governed by jurisprudence.[914] There are various Maltese judgments which revolve around the anti-competitive nature of a specific provision in a given contract. As a general rule, anti-competitive covenants are unlawful as these would, in turn, impose restrictions to trade; something which is of detriment to the public and the economy in general.[915] These principles were outlined in great detail in a number of cases.

The judgment ***First United Insurance Brokers Ltd vs. Karl Farrugia Wismayer***[916] revolved around the non-compete clause which stated that upon termination of employment, the employee (who had the role of a development manager)'shall not for his account or for any other person, firm or company, solicit or interfere or endeavour to entice away from the Employer any person who may be employed with the employer or may be a client of the employer'.[917] The plaintiff raised the plea of *pacta sunt servanda* since it was held that the defendant defaulted in his obligation as agreed in clause 13 of the labour agreement in question. However, the Court emphasised that, *prima luogo*, the clause must be valid at law. Needless to say, the defendant accentuated this issue of validity so as to render the provision null and without effect; which is what the Court, following an in-depth analysis of the clause, ultimately decided.

What is noteworthy at this point is the fact that this judgment was based, in its entirety, upon a single clause, namely, the non-compete clause. The Court held that the said clause was in restraint of trade '...għalhekk din il-Qorti tqis li l-klawsola in kwistjoni, fejn din tittratta l-klijenti tal-kumpannija attriċi, għandha

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912 *Nordenfelt vs. Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535.

913 *Bromley vs. Smith* [2 Biss. 511;1 5 N. B. R. 152; 3 Chi. Leg. News] 297.

914 Judge Abigail Lofaro, 'Non-competition clauses in labour contracts' (XIVth Meeting of Europoean Labour Court Judges, Cour de Cassation de Paris 2006) <http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/meetingdocument/wcms_159967.pdf> accessed 28 October 2016.

915 Ann Bevitt and Daniel P. Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (*Mondaq*, 2008) <http://www.mondaq.com/unitedstates/x/58880/Human+Resources/Employment+And+Privacy+Issues+In+NonCompetition+Agreements> accessed 28 October 2016.

916 *First United Insurance Brokers Limited vs. Karl Farrugia Wismayer*, per Mr Justice Zammit McKeon, First Hall Civil Court, 30 November 2010.

917 ibid p. 6.

titqies mingħajr effett għall-finijiet u effetti kollha tal-liġi',[918] which constitutes a breach of public policy, hence reckoned to be invalid. The issue of validity was greatly evaluated in the pre-dated judgment of ***Vassallo Cesareo vs. Cilia Pisani***.[919]

A key observation here is that, in spite of the nullification of clause 13, at no point did the Court consider the remainder of the contract as null. The resultant agreement remained intact and thus, still effective and very much enforceable.[920] A case which was decided in a similar manner as the previous one, due parallel facts, is ***Alberta Group vs. Mark Mifsud***.[921]

4. The current Maltese position: Hidden Trends

At this juncture, it is also essential to note that locally, to-date, there has not been a judgment which has declared a whole contract to be null and void simply because one of its clauses is held to be unenforceable. The tendency in Maltese jurisprudence is that usually it is only the clause in question which is deemed to be ineffective but the rest of the contract remains valid.

In light of all the above, therefore, one could deduce that the principle of severability is very much alive in the Maltese jurisprudence, at least indirectly, even though the Courts do not expressly refer to it in any way. The *raison d'etre* behind this line of thought is founded on the fact that in every decision, the Courts have time and time again analysed the illegality or otherwise of a specific provision/s (usually the non-compete clause followed by its consequent penalty clause) segregated from the rest of the agreement.

Two subsequent questions would follow therefore: what would happen if the invalidated clause is a key provision, thus carrying significant weight? So much so, that a fundamental concept or matter would be permanently eliminated, rendering the remainder of the contract practically worthless? In one case, before a United States Court, it was held that if the ineffective provision forms an integral part of the consideration, the whole agreement would fall.[922]

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[918] ibid p. 12.

[919] *Attilio Vassallo Cesareo u Saviour Coppini ghan-nom u in rapprezentanza tas-socjetà International Machinery Limited vs. Anthony Cilia Pisani*, per Mr Justice Sciberras, First Hall Civil Court, 31 January 2003.

[920] *First United Insurance Brokers Limited vs. Karl Farrugia Wismayer*, per Mr Justice Zammit McKeon, First Hall Civil Court, 30 November 2010.

[921] *Alberta Fire & Security Equipment Ltd (C-6606) et vs. Mark Mifsud*, per Mr Justice Zammit McKeon, First Hall Civil Court, 7 January 2014.

[922] 'Website about Contracts Management – Severability' (*Contracts*) <http://www.contracts.com/id103.html> accessed 28 October 2016.

5. The Common Law Tradition

The realm of severability clauses is rather unclear under Maltese law. This is due to shortage of legislation and case-law regarding the matter. As an attempt to resolve this pitfall, Maltese Courts could refer to English law, a major source of Maltese commercial law principles.

In order to establish whether an invalid provision can be separated from the rest of the contract, the English Courts apply the 'Traditional Blue Pencil Test'.[923] Through this exercise, the Courts examine the sensibleness of the contract. If, upon removal of the unreasonable portion, the consideration of the contract remains intact, then, the remainder will still hold. On the other hand, if the consideration does change, however, the contract tout ensemble will fail.[924] This was discussed in the classic judgment of ***Goldsoll vs. Goldman***.[925]

The aforementioned test is subject to a limitation, in the sense that the Courts will not set up a fresh agreement, as established in ***Beckett Investment Management Group Ltd. vs. Hall***.[926] The Courts will merely sever the invalid section from the rest of the contract. This segregation will not take place however provided that it would 'alter entirely the scope and intention of the agreement', as held in ***Atwood vs. Lamont***.[927]

6. The Civil Law Tradition

In the course of discussing the subject-matter at hand, which revolves around the law of contracts, one cannot disregard the position taken by the French legal system. This is because the Civil Code, which is the major source of contract regulation in Malta, has its roots in the French Code Napoleon.

Broadly-speaking, under French law, a severability clause cannot prevent the while contract from becoming null and void.[928]

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923 Michael Polkinghome, 'Beware of the Boilerplate – The Risks of Standard-form Clauses in Common and Civil Law Jurisdictions' (White & Case 2013) 4 <http://documents.jdsupra.com/1bcd32c3-b612-4811-aec2-46b0078d838b.pdf> accessed 28 October 2016.

924 ibid.

925 *Goldsoll vs. Goldman* [1915] 1 Ch 292.

926 *Beckett Investment Management Group Ltd. vs. Hall* [2007] IRLR 793.

927 *Attwood vs. Lamont* [1920] 3 KB 571.

928 Michael Polkinghome, 'Beware of the Boilerplate – The Risks of Standard-form Clauses in Common and Civil Law Jurisdictions' (White & Case 2013) 5 <http://documents.jdsupra.com/1bcd32c3-b612-4811-aec2-46b0078d838b.pdf> accessed 28 October 2016.

Correspondingly to the English position, French law is mostly concerned with the "cause" of the contract, which, must still be reflected even post-removal of the invalid clause. The French approach is more focused on the fact that the *cause*, which is an essential requisite for the validity of the contract, will be present. Furthermore, it is up to the French Courts to decide what constitutes the cause or otherwise of the agreement. Another principle followed under French law is that of economic balance of the contract, that is, the balanced protection of both parties' interests.[929]

7. The Severability Clause at EU level

In this scenario, a provision will only be deemed invalid if it falls under the prohibition contained in Article 101(1) of the Treaty of the Functioning of the European Union (TFEU). A contract will be voided as a whole only when it is impossible to separate the nullified clause from the residual provisions of the agreement.[930] Otherwise, if the alternative were to occur, that is, there being no severability, upon the removal of the said clause, the rest of the agreement would have no 'autonomous legal content'.[931] Whether or not the rest of the provisions will be considered as being valid or otherwise, is subject to the severability rules under national law.[932]

8. Conclusion

The motivation behind severability clauses is to mirror the parties' goals, protecting both their interests.[933] Proper attentiveness while drafting would ascertain that the parties' initial objectives are safeguarded.[934] This is also crucial as it would minimize the frequency of future complications and unnecessary disputes in Courts.[935] When applied in a strict manner, a severability clause could be considered as being a shortcoming since upon the invalidation of a provision, which would be of particular benefit to one of the parties, the balance of interests would be disrupted.[936]

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929 ibid.

930 Moritz Lorenz, 'An Introduction to EU Competition Law' (Cambridge University Press) 214.

931 ibid.

932 ibid.

933 Chadbourne & Parke LLP (*Lexology*, 29 May 2012) 'Boilerplate matters: severability clauses' <http://www.lexology.com/library/detail.aspx?g=b23155c6-add5-4aa6-b6bc-a5ebc63f5539> accessed 28 October 2016.

934 ibid.

935 Simon Stokes, 'Commercial Law Briefing: Getting the Boilerplate Right' (*Blake Morgan*, 22 September 2014) <http://www.blakemorgan.co.uk/training-knowledge/guides/2014/09/22/commercial-law-briefing-getting-boilerplate-right/> accessed 28 October 2016.

936 Michael Polkinghome, 'Beware of the Boilerplate – The Risks of Standard-form Clauses in Common and Civil Law Jurisdictions' (White & Case 2013) 5

After having analysed the main points linked to severability clauses, and their implications thereof, including strengthened economy and trade in general, it is extremely necessary that the Maltese legislator comes up with a clear and comprehensive standpoint regarding the matter. Even though a consistent pattern has in fact been identified, there are no reliable local instruments clearly reflecting the legislator's will in this regard. Enacting legislation tied with this subject matter is extremely relevant nowadays. Considering the ever-increasing complexity of agreements and the large amounts of commercial contracts concluded daily via electronic means, clarity and certainty in this regard are indispensable.

9. Public Policy

In the case ***Beacom et vs. Spiteri Staines***, the Court held, 'Il-prinċipju kardinali li jirregola l-istatut tal-kuntratti jibqa' dejjem dak li l-vinkolu kontrattwali għandu jiġi rispettat u li hi l-volontà tal-kontraenti kif espressa fil-konvenzjoni li kellha tipprevali u trid tiġi osservata. Pacta sunt servanda'.[937]

Where public policy is concerned, it has to be noted that it is an ambiguous concept, due to the fact that the law does not provide any definition as to what public policy consists of. The Civil Code states that 'things which are impossible, or prohibited by law, or contrary to morality, or to public policy, may not be the subject-matter of a contract'.[938] Therefore although a contract is governed by the will of the contracting parties, such contract needs to be within the parameters of the law, and if it breaches a principle considered to be public policy, then such contract would be unlawful, and unable to be upheld.

In ***Erika Gertrud Selma Menestret vs. Dr Georgine Schembri***,[939] the Court dealt with a case where due to Government policy not allowing the issue of an acquisition of immovable permit to two foreign persons of the same sex who desired to acquire immovable property, either in Malta, or in Gozo, an immovable was purchased in the name of one of the two foreigners. The intention was that the property would be co-owned between the two in equal and undivided shares between them, therefore, the purchaser was acting as a mandatory *prestanome* on behalf and in the interest of the other foreigner, in so far as the other one-half undivided share of the property was concerned. When the purchaser entered

<http://documents.jdsupra.com/1bcd32c3-b612-4811-aec2-46b0078d838b.pdf> accessed 28 October 2016.

937 *Gloria mart Jonathan Beacom et vs. Anthony Spiteri Staines*, per Mr Justice Said Pullicino, Mr Justice Agius, Mr Justice Camilleri, Court of Appeal (Superior), 5 October 1998, p. 13.

938 Civil Code, Chapter 16 of the Laws of Malta, art 985.

939 *Erika Gertrud Selma Menestret vs. Dr Georgine Schembri*, per Magistrate Demicoli, Court of Magistrates (Gozo), 28 March 2014.

into a promise of sale agreement, the other foreigner filed a warrant of prohibitory injunction in order to prevent being defrauded, and sued in order to safeguard her share.

One of the defences raised was that since the intention was to acquire the house in the foreigners' name, it was claimed that there was an illicit cause since the *prestanome* mandate was given to avoid public policy rules. Quoting the judgment ***Andrews vs. Borg***, the Court reiterated that,

> hija bla effett kwalunkwe obbligazzjoni magħmula fil-kawża illeċita u l-kawża hija illeċita meta hija pprojbbita mill-liġi jew kuntrarju għall-għemil xieraq jew għall-ordni pubbliku u l-konvenzoni hija kontra l-ordni pubbliku meta hija kontra l-interess ġenerali.[940]

As Laurent holds, 'Quando il fatto è illecito la legge non riconosce alcun effetto alla convenzione, è una obbligazione fondata su causa illecita, poiche' la causa si confonde con l'oggetto dei contratti; e quando la causa è illecitia l'obbligazzione è inesistence e non puo' avere alcun effetto.'[941]

In fact, in ***Haynes et vs. Schembri et***,[942] a *prestanome* mandate was considered as contrary to public policy because it was intended to circumvent the law, due to its illicit cause, in that the *prestanome* mandate did not concern a cause which would have been possible for the mandatary to do. On the contrary, the *prestanome* mandate in ***Menestret vs. Schembri***[943] was not deemed as being contrary to public policy because it was only a department policy that persons of the same sex and who were foreigners were not given an AIP permit, and therefore nothing in the law prohibited such purchase, thus the *prestanome* mandate was not intended to by-pass any law.

Furthermore, in congruence with the above cases, in ***Grech vs. Balzan et***,[944] the court stated that if parties enter into a contract whereby particular criteria required by law to be observed in a contract are in some way avoided or by-passed, then that contract is not to be given effect, and such an act goes contrary

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940 *Brian Richard and Devonia konjugi Andrews vs. Alfred Borg*, per Mr Justice Cuschieri, First Hall Civil Court, 31 October 2003, p. 9.

941 Laurent, *Principii di Diritto Civile*, vol 27 (1904) para 402.

942 *John William Haynes et vs. Michelle Schembri*, per Mr Justice Zammit McKeon, First Hall Civil Court, 28 February 2011.

943 *Erika Gertrud Selma Menestret vs. Georgine Schembri noe*, per Ms Justice Demicole, First Hall Civil Code, 28 March 2014.

944 *Avukat Leslie Grech vs. Nazzareno Sive Ronnie Balzan*, per Mr Justice Agius, Mr Justice Herrera, Mr Justice Mifsud Bonnici, Court of Appeal (Commercial), 11 June 1993.

to the public policy of Malta, and the court is not to enforce such contracts, since against constitutional doctrine.

These cases illustrate the intention of Article 995 of the Civil Code, as well as delineating the fine line between a lawful and an unlawful cause.

In order to decipher what public policy encompasses as a concept, one has to analyse the laws of other States, as well as examine local judgments which from time to time have had the opportunity on deciding matters of public policy.

In ***Paris et vs. Maltacom plc***,[945] the First Hall of the Civil Court attempted to define such term. The Court referred to Galgano's *Diritto Privato*, whereby it is said,

> Nel suo insieme la formola legislativa esprime una esigenza di difesa dei valori fondamentali della società: di difesa sia dei valori di natura collettiva, che attengono cioe' all pacifica e civile convivenza fra gli uomini e al loro progresso economico e sociale, sia di valori di natura individuale, relativi alla libertà, alla dignità, alla sicurezza dei singoli. L'ordine pubblico è costituito da quelle norme, anch' esse imperative, che salvaguardano i valori fondamentali sopra menzionati e che, tuttavia, non sono esplicitamente formulate dalle legge, ma che si ricavano per implicito dal sistema legislativo: dai codici e dalle altre leggi ordinarie e, sopratutto, dalla Costituzione.[946]

Therefore, Galgano refers to those fundamental values of society, values of an individual nature relating to freedom, dignity and security of others, as falling under the public policy umbrella. Such rules include national mandatory laws, whether found in codes, ordinary laws or in the Constitution.[947]

Moreover, the Court quotes Trabucchi where it is said that principles of public policy are not only those written down and expressed in rules, because they might be obtained also from mandatory provisions of both codes as well as from other norms.[948]

The importance of public policy is not only of significance to Maltese law but to the laws of different countries and States. In various European Union regulations,

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945 *Paris Francis vs. Maltacom plc*, per Mr Justice Mallia, First Hall Civil Court, 7 October 2004.
946 Galgano, *Diritto Privato* (2nd edn, CEDAM) 251 para 13.2.
947 *Paris Francis vs. Maltacom plc*, per Mr Justice Mallia, First Hall Civil Court, 7 October 2004, p. 16.
948 Trabucchi, *Istituzioni di Diritto Civile* (29th edn, CEDAM) 170 para 74.

public policy is given such importance that the recognition of a judgment shall be refused 'if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State addressed'.[949] Therefore if a foreign judgment breaches public policy, then this would be a defence against recognition and enforcement of a judgment, as evident in Article 827(1) COCP.[950]

European Court of Justice (Hereinafter referred to as 'CJEU') judgments may be resorted to in order to compile a list of matters that according to this Court are to be considered as matters of public policy. However, according to the CJEU, public policy is not to be given a wide interpretation. Therefore, the following cases illustrate matters which are likely to be considered as matters of public policy under Maltese law, but are not necessarily restricted to this list, given that a wider interpretation might be given to public policy by Maltese Courts and Maltese Law.

The CJEU, in the ***Krombach*** case, held that not all rules of national law are to be considered as rules of public policy, but must be fundamental and necessary in order to be applied. From this case it may be extracted that a breach of Article 6 of the European Convention on Human Rights (Hereinafter referred to as 'ECHR'), that is, the right to a fair hearing, is a breach of public policy.[951] In fact, in ***Maronnier vs. Larner***, a breach of Article 6 ECHR was considered as a sufficient reason for English courts to possibly raise the plea of public policy.[952] Maltese judgments reflect the same line of thought, because in several judgments, including ***Mary Zarb vs. Emma Azzopardi et***,[953] and ***Renato u Jaice Vidal vs. U.C.I.M. Co. Ltd***,[954] it was held that matters relating to the principles of *audi alteram partem* and *nemo judex in causa propria* are of a public policy nature.

In ***Elf Aquitaine vs. Andrea Guelfi***, the plaintiff demanded that a judgment from the Paris Court of Appeal was not to be recognised and consequently, not enforced, in Malta because it was manifestly contrary to Maltese public policy. This was based on the fact that a criminal court had ordered the payment of civil damages. According to Aquitaine, 'huwa principju bażilari tal-proċedura legali Maltija illi l-azzjoni kriminali u dik ċivili jitmexxew b'mod distint u indipendenti

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949 Council Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) [2012] OJ L 351/1, art 45.

950 Code of Organisation of Civil Procedure, Chapter 12 of the Laws of Malta, art 827(1).

951 Case 7/98 *Krombach v. Bamberski* [2000] ECR I-1935.

952 *Maronnier vs. Larner* [2002] 3 WLR.

953 *Mary Zarb vs. Emma Azzopardi noe*, per Mr Justice Sciberras, Court of Appeal (Inferior), 28 March 2007.

954 *Renato u Janice Vidal vs. U.C.I.M. Co. Ltd.*, per Mr Justice Sciberras, Court of Appeal (Inferior), 11 June 2010.

minn xulxin',[955] and therefore if the Maltese court enforced the payment of civil damages, such enforcement would be a manifest breach to local public policy.

The Maltese Court held that a matter is manifestly contrary to Maltese public policy 'jekk tkun tikkozza ma' xi prinċipju ta' dritt tant fondamentali, jew ma' xi prinċipju morali, li għandu neċessarjament iwassal lill-qorti [...] li tirrifjuta li tirrikonoxxi dik is-sentenza barranija'.[956]

With regard to the plea raised by Aquitaine, the Maltese courts held that although it is a basic procedural principle that a penal action and a civil action proceed separately, this is not fundamental, that is, a criminal judgment of a foreign court which had awarded civil damages in the same judgment, is not to be interpreted as being unable to be recognised in Malta. In fact, Maltese law provides situations where the penal aspect and the civil aspect are merged together, the Customs Ordinance, wherein an individual found guilty of a breach of Article 62 may be required to pay a fine for each wrongful act done, which fine amounts to three times more than the custom duty that was to be paid on that object, or a particular sum of money, whichever the greater, and a third of that amount is to be considered as a civil debt, to be paid to the Customs Department. Therefore, in the Aquitaine judgment, the Maltese Court considered that with regard to the civil aspect of the action and the ordering of the payment of damages, there was no breach of Maltese public policy.

In ***Cassar Pullicino vs. Valfracht Maritime Co. Ltd et***,[957] the Court referred to the issue of interests, whereby if interests are agreed to which are more than the 8% rate specified by our laws,[958] then it goes contrary to public policy. Moreover, in ***Cassar noe vs. Farrugia noe et***,[959] the Court not only mentioned the 8% interest rate capping as falling under public policy, but also the issue of compound interest, and the fact that such interest is not due for a time less than one year,[960] and this was also stated in ***Galea vs. Busuttil Naudi***.[961] Public policy in Malta encompasses the interest regime *en toute*, and no one aspect in particular only.

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955 *Elf Aquitaine vs. Andrea Guelfi*, per Mr Justice De Gaetano, Mr Justice Magri, Mr Justice Felice, Court of Appeal (Superior), 13 May 2008, p. 6.

956 ibid.

957 *Losinjska Plovidba Brodarstvo D.D. vs. Valfracht Maritime Co. Ltd u Valfracht Roro Line Ltd*, per Mr Justice De Gaetano, Mr Justice Depasquale, Mr Justice Magri, Court of Appeal (Superior), 29 October 2004.

958 Civil Code, Chapter 16 of the Laws of Malta, art 1139.

959 *L-Avukat Dr. Dominic A. Cassar nomine vs. Lawrence Farrugia nomine et*, per Mr Justice Mifsud Bonnici, Commercial Court, 19 June 1989.

960 Civil Code, Chapter 16 of the Laws of Malta, art 1850.

961 *Angelo Galea vs. Emmanuele Busuttil Naudi pro et noe*, per Mr Justice Harding, First Hall Civil Court, 31 October 1935.

In ***Dr Renato Cefai nomine vs. Valletta Freight Services Ltd***, a foreign tribunal ordered a payment of a sum of money in consequence of a dispute, as well as 10% interest *per annum*. When the decision of the tribunal was in the stages of being recognised, and later enforced in Malta, one of the arguments raised was that since the interest exceeded the rate of 8%, the rate specified by our laws in the Civil Code,[962] then such recognition and enforcement would be contrary to Maltese public policy. The court stated that although the according to the applicable law chosen by the parties in the dispute, the tribunal in question was not restricted by any particular rate, and could therefore order interests which are higher than those given according to Maltese law. This does not breach Maltese public policy, because Maltese law allows exceptions as to when interests higher than eight per cent, and because in the case in question, the rate of interest higher than eight per cent was not imposed as usury but as *officio iudicis*.

Reference may be made to ***Schoeller International GmbH vs. Mario Ellul et***,[963] where public policy was defined as 'prinċipji ewlenin tal-ordni ġuridiku li huma l-qofol tas-sistema billi jharsu l-valuri l-aktar fundamentali tas-socjetà'.[964] The Court stated that the principle of separate judicial personality of companies is a principle of public policy, since companies are to be liable for their obligations, without exposing the shareholders to liability.

In ***Avukat Dr Joseph Zammit McKeon vs. Laferla Insurance Agency Ltd***, the court held that the fact that a foreign law is different than Maltese law, does not result in a foreign judgment based on such different law to be deemed contrary to public policy and therefore unenforceable.[965] Similarly, as held in ***Attard noe vs. Cremona et noe***,[966] the court stated that when a party submits itself for the jurisdiction of a foreign court, then it cannot later be alleged that the judgment by the foreign court is contrary to the public policy of Malta due to a discrepancy between the procedural systems of Malta and of that particular State in question.[967]

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962 Civil Code, Chapter 16 of the Laws of Malta, art 1139.

963 *Schoeller International vs. Mario Ellul et*, per Mr Justice Giannino Caruana Demajo, First Hall Civil Court, 26th October 2001.

964 ibid 3.

965 *Avukat Dr Joseph Zammit McKeon vs. Laferla Insurance Agency Ltd*, per Chief Justice Silvio Camilleri, Mr Justice Tonio Mallia, Mr Justice Joseph Azzopardi, Court of Appeal (Superior), 25th October 2013.

966 *Joseph Attard nomine vs. Av. Dr. Rene A. Cremona et nomine*, Commercial Court, 26 March 1965.

967 ibid.

In ***Xuereb noe vs. Degabriele***,[968] the Court stated that issues relating to peremptory terms are considered to be based on public policy, and therefore commercial clauses not observing such terms would not be enforced due to be being contrary to public policy. Peremptory terms are based on public policy because otherwise rights of action based on such terms, including appeals, would be created by the parties and not by law.

Bond vs. Mangion et holds that commercial contracts concerning architects and contractors are based on public policy, and the Court quotes Laurent, Mortara and Aubry and Rau, who all are in consensus regarding such issue.[969] Professor Caruana Galizia states, 'It is to be noted, however, that the responsibility of the architect and of the contractor is regarded by jurists as indivisible and as of public policy, so that it cannot be derogated from, because the solidarity of buildings is required in the interests of the public'.[970]

The court in ***Mula vs. Cassar*** stated that stipulations *quotae litis* are governed by public policy, and as a result contractual clauses on stipulations *quotae litis* are deemed unenforceable in Malta.[971]

In ***Cassar noe vs. Farrugia***,[972] the Court directly stated if the Commercial Code, commercial customs and the Civil Code are in contradiction with the principle of public policy, it is the latter which is to prevail.[973]

In ***Attard noe vs. Cremona et noe***[974] the Court stated that when a party submits itself for the jurisdiction of a foreign Court, then it cannot later be alleged that the judgment by the foreign Court is contrary to the public policy of Malta just because there is a discrepancy between the procedural systems of Malta and of that particular State in question.[975]

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968 *Joseph Xuereb noe vs. Dolores Degabriele*, per Mr Justice Mifsud Bonnici, Mr Justice Herrera, Mr Agius, Court of Appeal (Superior), 14 May 1993.

969 *Michelangelo Bond vs. Carmelo Mangion and Joseph Camilleri Galea*, per Mr Justice Mifsud Bonnici, Mr Justice Herrera, Mr Agius, Court of Appeal (Superior), 27 May 1991.

970 Professor Caruana Galizia notes, p. 765.

971 *Paula Mula vs. Pietro Paolo Cassar*, per Mr Justice Mercieca, Mr Justice Agius, Mr Justice Camilleri, Court of Appeal, 15 May 1925.

972 *L-Avukat Dr. Dominic A. Cassar nomine vs. Lawrence Farrugia nomine et*, per Mr Justice Mifsud Bonnici, Commercial Court, 19 June 1989.

973 ibid.

974 *Joseph Attard nomine vs. Av. Dr. Rene A. Cremona et nomine*, Commercial Court, 26 March 1965.

975 ibid.

In ***Alberta Fire & Security Equipment Ltd vs. Mark Mifsud***[976] the Court stated that a clause which attempts to create relationships with third parties, parties with whom the contracting party to such clause was not involved with, neither *ex contractu*, nor in any other manner, was considered as contrary to public policy.

[976] *Alberta Fire & Security Equipment Ltd (C-6606) vs. Mark Mifsud*, per Mr Justice Zammit McKeon, First Hall Civil Court, 1 January 2014.